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KALUNG MAKMUR SDN BHD v. LO YEN NYUK

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: Q-02(IM)(NCVC)-1361-07-2016]
27 JULY 2017

TORT: *Defamation – Absolute privilege – Police report – Subsequent publication of police report to members of public – Whether malicious – Whether absolute privilege still applied from any suit relating to defamation – Whether case of Lee Yoke Yam v. Chin Keat Seng applicable*

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The respondent lodged a police report alleging that the appellant had lost three cheques which were handed to the appellant by the respondent. The appellant claimed that the words in the police report were understood to mean, *inter alia*, that the appellant was a criminal and an untrustworthy professional entity. The police report was subsequently published by the respondent by affixing it at a public notice board of Block A and Block D of Village Grove Condominium. The publication of the police report was alleged to have brought the appellant's reputation into disrepute. The appellant thus commenced an action against the respondent based on the tort of libel premised on the police report lodged by the respondent. The respondent consequently took out an application to strike out the appellant's statement of claim. The respondent's contention was that the police report made by the respondent was protected by absolute privilege and hence, no cause of action arose. The High Court allowed the respondent's application. Hence, the present appeal. Relying on the High Court case of *Hoe Thean Sun & Anor v. Lim Tee Keng*, the appellant argued that generally, although statements in police report enjoy absolute privilege from any suit relating to the tort of defamation, such privilege do not apply when the police report was made with malice.

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Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA for the majority:

(1) The case of *Hoe Thean Sun & Anor v. Lim Tee Keng* is no longer good law in view of the Federal Court decision in *Lee Yoke Yam v. Chin Keat Seng* ('*Lee Yoke Yam's* case') where the Federal Court held that statements in a police report are protected by absolute privilege and, as such, no cause of action arises from such a report. Malice was not a relevant consideration to the concept of absolute privilege as opposed to the concept of qualified privilege where could if malice was proven, that privilege could be taken away or dismantled and the maker of those defamatory remarks would suffer the consequences. (paras 11, 19 & 23)

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Per Hamid Sultan Abu Backer JCA (dissenting):

(1) *Lee Yoke Yam's* case dealt with the issue of the police complaint and the immunity in defamation for making the complaint. It did not deal with subsequent publications of the police report by the complainant to members of the public or part thereof. To say *Lee Yoke Yam's* case has given licence to defame by first lodging a police report and subsequently the complainant publishing it to the members of the public does not subscribe to the well-established jurisprudence relating to defamation in Malaysia. Therefore, the appeal should be allowed. (para 35)

Bahasa Malaysia *Headnotes*

Responden telah membuat laporan polis, mendakwa perayu menghilangkan tiga cek yang diserahkan kepada perayu oleh responden. Perayu mendakwa bahawa kenyataan dalam laporan polis difahami bermaksud, antara lain, perayu seorang penjenayah dan satu entiti profesional yang tidak boleh dipercayai. Laporan polis ini kemudiannya diterbitkan oleh responden dengan melekatkannya di papan notis awam Blok A dan Blok D Kondominium Grove Village. Penerbitan laporan polis tersebut didakwa mencemar reputasi perayu. Perayu seterusnya memulakan tindakan tort libel terhadap responden berdasarkan laporan polis responden. Responden, oleh itu, membuat permohonan untuk membatalkan pernyataan tuntutan perayu. Hujahan responden adalah bahawa laporan polis yang dibuat oleh responden dilindungi oleh perlindungan mutlak dan, oleh itu, tiada kausa tindakan yang timbul. Mahkamah Tinggi membenarkan permohonan responden. Oleh itu rayuan ini. Adalah ditegaskan oleh perayu, bersandar pada kes Mahkamah Tinggi *Hoe Thean Sun & Anor v. Lim Tee Keng* bahawa amnya, walaupun kenyataan dalam laporan polis menikmati perlindungan mutlak daripada apa-apa tuntutan berkaitan tort fitnah, perlindungan tersebut tidak terpakai apabila laporan polis dibuat dengan niat jahat.

Diputuskan (menolak rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan keputusan majoriti:

(1) Kes *Hoe Thean Sun & Anor v. Lim Tee Keng* sudah tidak lagi menjadi undang-undang yang boleh dipakai berikutan keputusan Mahkamah Persekutuan dalam kes *Lee Yoke Yam v. Chin Keat Seng* ('kes *Lee Yoke Yam*') yang memutuskan bahawa kenyataan dalam polis laporan dilindungi oleh perlindungan mutlak dan oleh itu, tiada kausa tindakan yang timbul daripada laporan tersebut. Niat jahat tidak menjadi pertimbangan relevan pada konsep perlindungan mutlak berbanding konsep perlindungan bersyarat iaitu jika niat jahat terbukti bahawa perlindungan tersebut boleh dirampas atau dikeluarkan dan pembuat kenyataan fitnah tersebut akan menghadapi akibatnya.

Oleh Hamid Sultan Abu Backer HMR (menentang):

(1) Kes *Lee Yoke Yam* telah mempertimbangkan isu aduan polis dan imuniti terhadap fitnah apabila membuat aduan. Kes ini tidak berurusan dengan penerbitan terkemudian laporan polis oleh pengadu kepada orang awam atau sebahagiannya. Untuk mengatakan bahawa kes *Lee Yoke Yam* telah memberi lesen untuk memfitnah dengan membuat laporan polis terdahulu dan seterusnya pengadu menerbitkannya kepada orang awam tidak boleh diterima oleh undang-undang mantap fitnah di Malaysia. Oleh itu, rayuan ini wajar dibenarkan.

Case(s) referred to:
Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA ***(refd)***
Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***
Buckley v. Dalziel [2007] EWHC 1025 ***(refd)***
Hoe Thean Sun & Anor v. Lim Tee Keng [1999] 1 CLJ 187 HC ***(refd)***
Lee Yoke Yam v. Chin Keat Seng [2012] 9 CLJ 833 FC ***(refd)***
Lincoln v. Daniels [1962] 1 QB 237 ***(refd)***
Mak Khuin Weng v. Melawangi Sdn Bhd [2016] 8 CLJ 831 CA ***(refd)***
Martin Rhienus v. Sher Singh [1949] 1 LNS 49 HC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Royal Aquarium v. Parkinson [1892] 1 QB 431 ***(refd)***
Taylor v. Director of the Serious Fraud Office [1999] 2 AC 177 ***(refd)***
Watson v. M'Ewan [1905] AC 481 ***(refd)***
Wescott v. Wescott [2008] EWCA Civ 818 ***(refd)***
Zahida Mohamed Rafik v. Noor Azman Azemi [2017] 10 CLJ 717 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(1)
Criminal Procedure Code, ss. 107, 112
Defamation Act 1957, ss. 11(1), 12(1), Schedule Part 1
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 92 r. 4
Rules of the High Court 1980, O.18 r. 19(1)(a), (b), (c)

Other source(s) referred to:
Gatley on Libel and Slander, 12th edn, p 461
Lakshminath and Sridhar *Ramasamy Iyer's "Law of Torts"*, 10th edn, pp 670, 671

For the appellant - Ateng Jeros; M/s Ateng Jeros Advocs
For the respondent - Chong Siew Chiang & Carol Lua Di Chiun; M/s Chong Brothers Advocs

[Editor's note: Appeal from High Court, Kuching Suit No: KCK-22NCVC-48-11-2015 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] We have read the draft grounds of our learned brother, Justice Hamid Sultan bin Abu Backer. However, with regret and respect, we are unable to concur with him on the outcome of this appeal. Hence the grounds herein are the views of myself and my sister Justice Umi Kalthum binti Abdul Majid and reasons as to what we think should be the outcome of this appeal.

[2] This is an appeal by the appellant/plaintiff against the decision of the High Court in which the learned judge allowed an application pursuant to O. 18 r. 19(1)(a) Rules of Court 2012 by the respondent/defendant to strike out the statement of claim in which the cause of action is grounded on the tort of libel premised on a police report made by the respondent.

[3] We heard the appeal on 18 April 2017 and had reserved our decision. We have since given further consideration to the submissions by respective counsel and now give our decision and grounds.

Background Facts

[4] The appellant has a service contract with Village Grove Condominium Management Corporation (VGC) in which the appellant provided services which included collecting payments from debtors of VGC and forward any payments of debts to the creditors of VGC.

[5] Three cheques were issued by VGC, two of those cheques were issued to Yunco Enterprise Sdn Bhd (Yunco) and Perunding EC Rakan. These cheques were signed by the respondent and one Angeline Bateman who are the authorised signatories of the cheque account of VGC. The cheques were collected by the appellant's employee on 17 July 2015.

[6] On 20 July 2015, VGC received a letter from Yunco with a threat to sue VGC for loss and compensation for non-payment of its debt to Yunco. The respondent made enquiries with the appellant, to which no reply was received by the respondent and neither were the cheques returned back to the respondent.

[7] In view of what had happened to his enquiries, the respondent made a police report relating to the three cheques. The police report was then published by the respondent by affixing the same on the public notice board of Block A and Block D of the condominium complex.

[8] The police report reads as follows:

> I, Lo Yen Yuk (541216-13-5206) is making this report on behalf of residents of Village Grove Condominium (VGC).
>
> Three cheques dated 13/7/2015 as stated below and issued by VGCMC cannot be located today.

A 1. Yunco Enterprise Sdn. Bhd. (Yunco) – HLBB 001081 amounting to RM169,911.34 dated 13.7.2015.

2. Yunco Enterprise Sdn. Bhd (Yunco) – HLBB 001082 amounting to RM61,051.00 dated 13.7.2015.

B 3. Perunding EC Rakan (EC) – HLBB 001083 amounting to RM15,000.00 dated 13.7.2015.

Fifiriana, the account clerk of Kalung Makmur Sdn. Bhd. (KM) has collected the cheques from me on 16.7.2015 for the payment to VGC's contractor, Yunco and VGC's consultant. EC still haven't received any payment from KM despite frequent follow up with C KM office.

The cheques were signed by two other council members, VGC is undergoing a change of council members. I learnt from Ms. Joyce Kho, the manager of Hong Leong Bank (HLB), RH Plaza Branch that the new council members went to HLB on 10.7.2015 to D change the signatories to their names and signatures. They submitted the minutes of a meeting held on 9.7.2015 which showed them to be the new council. No authorisation letter from old council members was given. Without further verification HLB made the change in signatures based on the minutes given by new council members and effective from 15.7.2015 onward.

E The new signatories that the bank allowed consist of three people which have no right to hold any office in VGC. They are not proprietors and are not allowed to be council members under the Strata Title Ordinance (STO). Their positions as council members are now being challenged by other residents. Their meeting on 9.7.2015 did not comply with the STO and is therefore illegal and F their election as council is null and void.

The HLB also said the cheques were invalid since the signatories have been changed.

VGC is now faced with the problem of three missing cheques. G Failure to pay on time will result in losses and damage due to contractor taking legal action. We make this report for the police to investigate all the above.

[9] Premised on the police report, the appellant alleges in the statement of claim that in their literal and ordinary meaning, as summarised by the H learned judge, they were understood to mean that the appellant is a criminal, untrustworthy professional entity in the performance of its job, inefficient, careless and/or negligent in performing its duty and incapable of handling clients' or people's affairs. It is also alleged that the publication of the police report has brought the appellant's reputation as a property management company into disrepute, thereby lowering the appellant's I esteem in the eyes of its clients, the residents of the property and/or damaged the appellant's employment prospect. The loss of reputation and dignity is irreparable and the business of the appellant has been badly affected.

[10] The respondent as alluded above took out an application to strike out the statement of claim premised on the ground that the police report made by the respondent is protected by absolute privilege and hence no cause of action arises.

High Court

[11] The learned judge agreed with the respondent and relying on the Federal Court case of *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833 where it held that statements in a police report are protected by absolute privilege and as such, no cause of action arises from such a report.

Our Grounds Of Decision

[12] This appeal stems from an interlocutory application. We are hearing this appeal by way of a rehearing as demanded by s. 69(1) of Courts of Judicature Act 1964 which basically means that we approach it as if we are hearing it for the first time but of course giving the appropriate weightage to the reasoning of the learned judge.

[13] At this juncture, we remind ourselves what approach which we need to adopt in dealing with an interlocutory application to strike out the statement of claim pursuant to O. 18 r. 19(1)(a) or (b) or (c) or (d) and/or O. 92 r. 4 Rules of Court 2012. The court's approach in such application is well established and it is clearly set out in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 where the Federal Court through Gopal Sri Ram JCA says, at p. 744 as follows:

> The power to summarily strike out a pleading must be sparingly exercised and in respect of the philosophy that underlies the exercise of that power we can do better than to quote from the judgment of Mohamed Dzaiddin SCJ in *Bandar Builder Sdn. Bhd. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at p. 44:
>
> This Court as well as the Court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson* [1915] 31 TLR 418 and *Wenlock v. Moloney & Ors.* [1965] 1 WLR 1238).

[14] Also in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457 this court states, at p. 467 as follows:

> We would like to make it clear that at this stage of the proceedings on an application under O. 18 r. 19(1) of the Rules of the High Court 1980, we are not concerned with the prospect of success or failure of Carah's claim. This is a matter for the trial judge to decide on the evidence adduced before him. We are only concerned whether there is a reasonable cause

A of action raised by the appellants. We are of the opinion that the allegations in paras 10(1) and 10(1)(a) of Carah's statement of claim, on the assumption that they are true or proven, and without looking at the affidavit evidence, clearly disclose a reasonable cause of action. Accordingly, we are of the view that the lenders' application to strike out Carah's statement of claim under O. 18 r. 19(1)(a) of the Rules of the B High Court cannot succeed.

[15] From the submission of the appellant's counsel and the contents of the statement of claim, it can be said that the appellant's cause of action is simply premised on the tort of defamation.

C **[16]** The main complaint of the appellant is simply that this is not an appropriate case for the court to exercise the draconian power to strike out the statement of claim as the appellant had shown that there are triable issues which require a full trial to determine.

[17] The learned judge from the outset decided that she will not look at the D affidavits filed by respective parties as she felt that the application was substantially anchored on O. 18 r. 19(1)(a). There were 21 affidavits filed altogether. This refusal to look at affidavits is in fact a ground of appeal. We find merit in this complaint as the respondent's application is premised also on O. 18 r. 19(1)(b) or (c) or (d) and/or O. 92 r. 4 Rules of Court 2012 E which allow affidavits to be filed to support or oppose the application. The averments of the appellant would be of utmost importance in this context as they contain reasons which may show that they have a reasonable cause of action. To ignore them, with respect, would be denying the appellant the opportunity to show that the statement of claim contains triable issues, no F matter how weak they are, which require a full trial to determine. Be that as it may, as this appeal before us is a rehearing, we will take those affidavits into consideration for our deliberation.

[18] It is submitted by counsel for the appellant that generally, statements in police report enjoy absolute privilege from any suit relating G to the tort of defamation except when the police report is made with malice. To support his contention, we are referred to a High Court case of *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 1 CLJ 187 where the learned judge held, at p. 191 as follows:

H The law clearly recognises that all statements made in a police report are statements made on a privileged occasion. However, the privilege is qualified and not absolute. The primary purpose of a police report is to set in motion the investigation of an offence and bring to justice the offender and perpetrators, if any, at the conclusion of the investigation by the appropriate authorities.

I The onus lies on the plaintiff to prove malice and not the defendant to prove his *bona fides* or absence of malice. When the occasion is privileged the *bona fides* of the defendant is always presumed. In this case, there is no doubt that, in law, the defendant published the defamatory statements on

> a privileged occasion. It is, therefor, to be assumed that he published it honestly, believing his statements to be true, unless there is some evidence to the contrary, for example, that the defendant was fully apprised of the letter dated 20 May 1992 (p. 10, bundle B) and the letter dated 5 November 1992 (p. 11, bundle B) at any time before he lodged his report. The fact that the defendant had been informed by the 1st plaintiff on 17 March 1993 that the MGR shares had not been deposited with him and that he had also informed the defendants solicitors by letter dated 7 April 1993 (p. 14, bundle B) and letter dated 12 April 1993 (p. 1, bundle A) that the original share certificates were never in his possession, cannot establish malice without the further evidence that the defendant was fully aware of the letter dated 20 May 1992 (p. 10, bundle B) and letter dated 5 January 1992 (p. 11, bundle B), coupled with the fact that the said letters had been brought to his attention (before he made the report) either by Sey Hoe Sdn. Bhd. or the plaintiffs themselves, in support of the claim that the shares were never in fact in the possession of the first plaintiff at any time after the sale and purchase agreement had been executed.

[19] With respect, what is expounded by the learned judge in *Hoe Thean Sun & Anor (supra)* is no longer good law in view of the Federal Court decision in *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833. In that case, the respondent had lodged a police report based on the contents of an affidavit filed by the appellant to oppose the respondent's injunction in another suit. The appellant took out a legal suit against the respondent premised on the tort of defamation for what was stated in the police report. Like in the case at hand, the respondent there took out an application under O. 18 r. 19(1)(a), (b) and (c) of the Rules of the High Court 1980 to strike out the suit. Both the High Court and the Court of Appeal allowed the application and duly dismissed the writ and the statement of claim premised on the ground that a police report enjoyed absolute privilege against any claim for defamation.

[20] The Federal Court granted leave to appeal on this sole question:

> Whether statements in a police report are protected by the defence of absolute privilege and therefore no party can file a defamation suit against the maker of the police report in the Malaysian context?

[21] In that case, the plaintiff in his pleadings had alleged that the defendant had made the police report with malice with the intention to coerce the plaintiff into settling several lawsuits between the parties. The Federal Court, through the judgment of the then learned Chief Justice Arifin Zakaria, discussed the position of the law in the Indian and English jurisdictions and found that in both jurisdictions, absolute privilege is accorded to statements made in a police report irrespective whether there is element of malice on the part of the defendant. The then learned Chief Justice then discussed cases in our jurisdiction, more particularly the judgment of this court in *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121 which, in essence, affirmed the Indian and English positions.

[22] The then learned Chief Justice also set out the rationale of according absolute privilege to statements made in a police report.

> [32] Premised on the above, we agree with the decision of the Court of Appeal in *Abdul Manaf Ahmad (supra)* that on public policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under s. 107 of the CPC as in the case of statement made under s. 112 of the CPC. The underlying reason behind this, is the overriding public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice. It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant. In any event, if a false report is lodged by a complainant, he is liable to be prosecuted for making false report under s. 177, s. 182 or s. 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[23] Learned counsel for appellant in his submission had stressed that the appellant ought to be given his day in court to prove the element of malice on the part of the respondent. Particulars of malice are set out in details in the statement of claim and the numerous affidavits filed by the appellant. Learned counsel in his submission also alluded us to the fact that the respondent had circulated the police report to residents of the condominium complex and this action is consistent with the malicious intent of the respondent. With respect, and as much we want to agree with learned counsel for the appellant, that is not the law of the land. Malice is not a relevant consideration to the concept of absolute privilege as opposed to the concept of qualified privilege where if malice is proven that privilege can be taken away or dismantled and the maker of those defamatory remarks will suffer the consequences. In any event, as pointed out by the then Chief Justice in *Lee Yoke Yam (supra)*, criminal prosecution for lodging a false report is an adequate remedy for the malice factor.

[24] Our view is consistent with this court of another panel in the recent case of *Zahida Mohamed Rafik v. Noor Azman Azemi* [2017] 10 CLJ 717 where it also related to a police report lodged by the appellant/defendant against her driver/respondent/plaintiff concerning of his failure to deposit a large amount of monies in the appellant's bank account as instructed. At a press conference, the appellant had repeated what was stated in the police report. At the High Court, the learned judge found that the respondent had a valid cause of action in defamation. This court on appeal found that the learned judge had erred in failing to appreciate and apply the law which states that police report and its contents enjoyed absolute privilege in a defamation action and hence dismissed the respondent's defamation suit against the appellant.

Conclusion

[25] This is a case where the highest court of the land has spoken with clarity such that we had little problem in concluding that this is a fit and proper case to exercise the court's summary power to dismiss the appellant's claims as they are obviously unstainable in law or most unlikely to succeed at trial.

[26] For reasons stated above, we dismiss the appeal with costs in the sum of RM5,000 subject to payment of allocatur fees. We also order the deposit to be refunded.

Hamid Sultan Abu Backer JCA (dissenting):

[27] The appellant's/plaintiff's appeal is in respect of the decision of the learned High Court Judge who on the application under O. 18 r. 19 of Rules of Court 2012, of the respondent/defendant had struck out the plaintiff's action for defamation relating to lodging of a police report and subsequent publishing thereof to the public or part thereof on the grounds that both the conduct of the defendant is absolutely privileged.

Preliminary Jurisprudence

[28] It is trite that the conduct of reporting to the police (even with malice) or some relevant bodies or tribunals as far as the complaint is concerned is absolutely privileged. Further, the use of such police report in court proceedings and/or some relevant bodies or tribunals, etc will be accorded similar protection. (See *Taylor v. Director of the Serious Fraud Office* [1999] 2 AC 177; *Lincoln v. Daniels* [1962] 1 QB 237; *Watson v. M'Ewan* [1905] AC 481, 486). However, when third parties who wish to publish such statements such as newspapers, etc will not have the benefit of absolute privilege and at the most, they will be entitled to the defence of qualified privilege only unless the provision of Defamation Act applies. If the publication is done by third parties with malice, the defence of qualified privilege will not be entertained by the courts.

[29] If the complainant lodges a police report and subsequently publishes it to the public, then that second publication will not qualify for the defence of absolute privilege. However, if the defendant can establish the truth of the contents of the statement in the police report, then an action for defamation cannot succeed. I will deal with the above propositions in detail below.

Absolute Privilege And Police Report

[30] It is well-established in England, Malaysia and India that the conduct of reporting to the police is absolutely privileged. Subsequent usage of the report for legitimate purpose such as court proceedings or in tribunal, etc may continue to have such protection, unless otherwise held by the court based on the facts and motive, etc. (See *Gatley on Libel and Slander*, 12th edn. p. 461).

[31] The Federal Court in Malaysia had only declared the police report is absolutely privileged in a limited sense as I have stated earlier. There are no authorities by the apex court or in England to suggest a second publication by the complainant to the public or limited members of the public will entitle him to raise the defence of absolute privilege, though the defence of qualified privilege will be available. The distinction here in the law of defamation is not one of an apple and orange but that of a marble and pumpkin. The reason being, for example, if a malicious complainant wants to defame any person including members of the Judiciary, he just needs to lodge a malicious police report and circulate the said report to the public. The second publication which will undermine the administration of justice, if given the status of absolute privilege, will not subscribe to the concept of upholding the rule of law as well as to accord to common sense in the decision-making process. However, if the complainant upon sued, is able to prove the truth of the statements as said earlier, the action for defamation as well as even for criminal defamation will not succeed. The truth of the contents of the statement is the absolute defence in all defamation action. Support for the propositions and case laws are as follows:

(a) It is well-established that intention is not as a rule an essential condition of liability for torts. However, intention, motive, etc may be relevant for quantum claimed in tortious action. Learned authors, Lakshminath and Sridhar on *Ramasamy Iyer's "Law of Torts"*, 10th edn, at p. 670 says:

> Intention is not as a rule an essential condition of liability for torts. The cases where it is required are rather exceptional, eg, assault, *deceit*, defamation, in cases where a defence of privilege or fair comment is available, malicious prosecution, injurious falsehood, interference with trade or contractual relations and conspiracy. However, it is unnecessary in the case of large and important categories of wrongs, eg, injuries to person or property, nuisance, defamation in cases other than those mentioned above, infringement of patent, copyright, or trademark. Therefore, in a large class of cases absence of intention or *bona fide* mistake is not a valid excuse.

And at p. 671:

> There is a need for formulating a general rule that intentional harm is actionable unless there is a just cause or excuse. It has the support of a dictum of Lord Bowen and has been advocated by eminent writers like Sir Frederick Pollock.

(b) Thus, intention and motive play a crucial role in the law of defamation for liability as well as quantum. It is reflected in Malaysian Defamation Act 1957 (DA 1957). However, there will not be any liability if the defence of absolute privilege applies either by statute and/or case laws. If absolute privilege arises pursuant to case laws, it may be necessary to consider in what circumstances and facts the court had accorded

absolutely privilege based on public policy. Thus, not all defamatory conduct with intention or motive will fall into the category of absolute privilege. For example, in *Royal Aquarium v. Parkinson* [1892] 1 QB 431, Lopes CJ explained the judicial policy in granting absolute privilege to judicial proceedings as follows:

> This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that the courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

(c) The common law principles of absolute privilege was only limited to what the issues were before the judge and what was pronounced based on public policy. It did not extend to all subsequent publications sundry. Wider coverage to absolute privilege for judicial proceeding came into existence by virtue of DA 1957. Even DA 1957 did not permit absolute privilege for judicial proceeding when it is published sundry. For example, s. 11(1) gave only a conditional form of absolute privilege to judicial proceedings. Section 11(1) states:

> **Reports of judicial proceedings**
>
> 11(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

(d) Even what is stated as absolute privilege in s. 11(1) cannot be used in newspaper publications sundry. This is restricted in s. 12(1) and when the newspaper publishes it, it only attracts qualified privilege provided it is not made with malice. Section 12 states:

> Qualified privilege of newspapers
>
> 12 (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is

A proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

B (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

C Part I of the Schedule of DA 1957 read as follows:

PART I

1. A fair and accurate report of proceedings:

(a) of the legislature of any part of the Commonwealth other than in
D Malaysia;

(b) of an international organisation of which Malaysia or the Government thereof is a member;

(c) of an international conference to which the Government sends a representative;
E

(d) before any court exercising jurisdiction throughout any part of the Commonwealth (as defined in the Constitution) outside Malaysia or a court martial held outside Malaysia under any written law in force in Malaysia or under any Act of the United Kingdom Parliament; and
(e) of a body or person appointed to hold a public enquiry by the
F Government of Malaysia or any State thereof or by the legislature of any part of the Commonwealth outside Malaysia.

[32] In essence, if at common law a police report is accorded absolute privilege it will be limited to that particular facts only, ie, the lodging of the police report and the subsequent use in judicial proceedings, etc. It cannot
G be said through the development of case laws and statute in England or Malaysia the courts by giving absolute privilege to a police report, that report can be used freely for all publications. (See *Wescott v. Wescott* [2008] EWCA Civ 818). Such an assumption or conclusion will be directly in conflict with the jurisprudence underlying ss. 11(1) and 12(1) of DA 1957, thereby giving
H license to defame any person by subsequent publications of the police reports or contents therein, to the public or part thereof.

[33] *Wescott*'s case is the leading case in England which confirmed absolute privilege to the act of making a police report that is in respect of initial complaint. In *Buckley v. Dalziel* [2007] EWHC 1025 (*Buckley* case), absolute
I privilege was extended to witness statement. The earlier position was that it only was accorded with qualified privilege.

[34] *Wescott*'s case relates to police report and absolute privilege only. Ward LJ *inter alia* had this to say: A

> [32] The authorities recited above have made it clear that the justification for absolute immunity from suit will depend upon the necessity for the due administration of criminal justice that complaints of alleged criminal conduct should always be capable of being made to the police free from B fear that the person accused will subsequently involve the complainant in costly litigation. There is a countervailing public interest in play which is that no-one should have his or her reputation traduced, certainly not without affording him or her a remedy to redress the wrong. A balance has to be struck between these competing demands: is it necessary to clothe the occasion with absolute privilege in which event even the C malicious complainant will escape being held to account, or is it enough to allow only the genuine complainant a defence? Put it another way: is it necessary to protect from vexatious litigation those persons making complaint of criminal activity even at the cost of sometimes granting that impunity to malicious and untruthful informants? It is not an easy balance to strike. **We must be slow to extend the ambit of immunity.** (emphasis D added).

[35] In Malaysia, absolute privilege to making of the police report was first recognised by our apex court in the case of *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833; [2013] 1 MLJ 145. *Lee Yoke Yam*'s case dealt with the police complaint and the immunity in defamation for making the complaint. E It did not deal with subsequent publications of the police report by the complainant to members of the public or part thereof. To say *Lee Yoke Yam*'s case has given licence to defame by first lodging a police report and subsequently the complainant publishing it to the members of the public does not subscribe to the well-established jurisprudence relating to defamation in F Malaysia. (See *Licence to Defame* by Kwan Will Sen, http:www.skrine.com/licence-to-defame).

[36] The previous position except for two cases, namely: (i) *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121; [2011] 4 MLJ 346; (ii) *Martin Rhienus v. Sher Singh* [1949] 1 LNS 49; [1949] 1 MLJ G 201; took the position police report as well as subsequent publications was accorded qualified privilege only unless the relevant sections in the DA 1957 applies. The case of *Lee Yoke Yam*, in my view, did not make all decisions related to subsequent publications of police report to be accorded with absolute privilege. H

[37] In *Martin Rheinus*'s case the court stated a complaint under s. 107, ie, police report or statement to the police under s. 112 of Criminal Procedure Code was absolutely privileged. The court went to say that the complainant as well as the statement will be covered by absolute privilege. The court endorsed the decision of the Indian Court and had this to say: I

A In India, where the law relating to a police investigation is similar to the local law, it was decided in *Methuram Dass v. Jaggannath Dass* ILR 28 Cal 794 that a statement made in the course of a police investigation was absolutely privileged. The reasoning in the judgment in that case is:

> In the present case the investigation was required by law; it was conducted under the provisions required by the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all questions put to him by the police officer conducting the investigation and was punishable if he answered untruly and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a Court of Justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above – that was in the case of *Dawkins v. Lord Rokeby* (1875) LR HL 744 – why public policy should not equally prevent an action being brought against him as against a witness in an ordinary Court of Justice.

I agree with that decision and the reasoning for it.

[38] *Martin Rheinus*'s case had nothing to do with subsequent publication by the complainant to the public or part thereof.

[39] In *Abdul Manaf*'s case the defendant had lodged a police report against the plaintiff for lodging a police report against the plaintiff alleging criminal breach of trust. Based on the police report, the plaintiff was arrested and subsequently the Public Prosecutor had informed the plaintiff that he had decided not to proceed with the defendant's complaint. Following from that, the plaintiff initiated an action for defamation and malicious prosecution. Justice Gopal Sri Ram JCA (as His Lordship then was) in reliance of *Martin Rheinus*'s case and many other cases held that the police report was absolutely privileged. His Lordship had this to say.

> [3] When this appeal was called on, the attention of counsel on both sides was drawn to the decision of the Court of Appeal of the Federated Malay States in *Martin Rheinus v. Sher Singh* [1949] MLJ 201, where it was held that a statement made by a person to a police officer in the course of police investigation is absolutely privileged. In the course of his judgment, Willan CJ referred, without any criticism, to the observation of the trial judge in that case as follows:
>
> > He [the trial judge] held, however, that the statement was absolutely privileged, and, after citing several Indian cases, decided 'that no distinction can be drawn between the privilege which must be accorded to an information given to a police officer under s. 107 of the Criminal Procedure Code and to a statement recorded by a police officer under s. 112'.

[4] It is implicit from *Martin Rhienus v. Sher Singh* that both statements made in first information reports under s. 107 of the Criminal Procedure Code and in police statements made under s. 112 thereof are absolutely privileged for the purpose of the law of defamation. I consider this to be good law. And I find support for the view I take of the matter from the decision of several Indian cases including *Bapalal & Co v. V Krishnaswami Iyer* AIR 1941 Mad 26. That was a case in which a letter of complaint to the police by the defendant alleging that the plaintiff had committed a crime was held to be absolutely privileged and therefore not actionable. By reason of what I have said thus far, I am unable to agree with the view expressed in *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 3 MLJ 138, that a defamatory statement in a police report is only protected by the defence of qualified privilege. It is apparent from the report of that case that the decision in *Martin Rhienus v. Sher Singh* was not brought to the attention of the High Court. There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports.

[5] Learned counsel's response to the privilege point is that it was not taken by the defendant in its defence in the instant case. He argued that it was a matter for the defendant to plead the defence and that it was not open for this court to dismiss his client's appeal on an unpleaded defence. In my judgment the point is well taken. It is settled that a court is duty bound to decide a case only on the points raised in the pleadings. See, Haji Mohamed *Dom v. Sakiman* [1956] MLJ 45. It is equally settled that in an action for defamation not only must the defence of privilege be specially pleaded, but the facts and circumstances must also be stated showing how and why the occasion is privileged. See, *Stallworthy v. Geddis* (1909) 28 NZLR 366. Accordingly the only issue left for us to decide is whether the plaintiff's claim is barred by limitation.

[40] Even the case of *Abdul Manaf* had nothing to do with subsequent publications by the complainant to the public or part thereof.

[41] In *Lee Yoke Yam*'s case, the issue before the court was whether the statement in a police report under s. 107 is protected by defence of absolute privilege. In that case, the defendant had lodged a police report against the plaintiff. The plaintiff filed a suit for defamation and pleaded malice in making the police report. The Federal Court went to say, even if the police report was maliciously made that will still be accorded absolute privilege. There was no issue before the Federal Court in respect of subsequent malicious publications of the police report to the public or part thereof. This distinction must be kept in mind to appreciate the grounds of this judgment. The Federal Court had particularly stated that the sole issue was the police report. His Lordship Arifin Zakaria CJ had this to say:

A [18] The sole issue before us is whether statements in a police report under s. 107 of the Criminal Procedure Code ('the CPC') are protected by the defence of absolute privilege or otherwise.

[42] The Federal Court went to consider the position in India as well as England to anchor the point that a police report even if maliciously made B will be accorded absolute privilege. That part of the judgment as well as the conclusion read as follows:

Indian position

[27] In India, a statement contains in a police report enjoys absolute privilege. Thus, in the case of *Bapalal & Co v. AR Krishnaswami Aiyar* AIR C 1941 Mad 26, King J held as follows:

> I am accordingly of opinion that the weight of authority is in favour of the view that a complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely D privileged.

[28] Similarly in *V Narayana Bhat v. E Subbanna Bhat* AIR 1975 Kant 162, M Sadanandaswamy J held at p 165:

> … With regard to the second illustration referred to by Blagden J, if the complaint to the police results in an unsuccessful E prosecution the person defamed can only claim damages for malicious prosecution and not for defamation. In case the complaint to the police does not result in a prosecution, then also the persons defamed have no remedy in respect of defamatory statements made in such a complaint to the police. But if a false complaint is made to the police, the person who makes such a false F complaint would be punishable either under s 182 or s 211 of the Indian Penal Code. It cannot therefore be said that a person against whom false charges are made in a complaint to the police, even if no further action is taken by the police authorities on such complaint, goes scot-free. I would, therefore, prefer to follow the earlier view of Division Bench of the same High Court in AIR 1939 G Cal 477 and the other decisions referred to above which take the view that a complaint to a police officer is absolutely privileged.

[29] Hence, the Indian law has always accorded absolute privilege to statement made in a police report (See also *Thekkitill Gopalankutty Nair v. Melepurath Sankumi Ezhuthaseah* AIR 1971 Ker 280; and *Bira Gareri v. Dulhin* H *Somaria and Others* AIR (49) 1962 MYSORE).

English position

[30] Similarly in England, from a long line of authority, it is established that absolute privilege is accorded to statement made in a police report. I In *Taylor v. Director of the Serious Fraud Office* [1999] 2 AC 177, the House of Lords held:

> In the first place, I cannot accept the proposition that persons who take part in the administration of justice are sufficiently protected by qualified privilege. This would be contrary to a long line of

authority. It is the policy of law to protect such persons against baseless allegations of malice, and this requires nothing less than absolute immunity from suit.

[31] In the case of *Westcott v. Westcott* [2008] EWCA Civ 818, Ward LJ, in delivering the judgment of the court observed:

> [34] In my judgment the answer is to be found in *Taylor v. Director* of the Serious Fraud Office. That establishes that immunity for out of court statements is not confined to persons who are subsequently called as witnesses. The policy being to enable people to speak freely, without inhibition and without fear of being sued, the person in question must know at the time he speaks whether or not the immunity will attach. Because society expects that criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of the statements which they make. That applies whether they are informants, investigators, or prosecutors. The answer to the argument that immunity should not give protection to a malicious informer was tellingly given by Lord Simon of Glaisdale in *D v. National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 607 [1978] AC 222 at 233:
>
> > I cannot leave this particular class of relevant evidence withheld from the court (the identity of the informant who gave information of ill treatment of children to the NSPCC) without noting, in view of an argument for the respondent, that the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused, the balance of public advantage lies in generally respecting it.
>
> [35] The test proposed by Drake J in *Evans v. London Hospital Medical College* [1981] 1 All ER 715; [1981] 1 WLR 184 received indorsement from their Lordships in *Taylor v. Director of the Serious Fraud Office*. Thus the question is whether the oral statement made by the defendant and her subsequent written statement can each fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated.
>
> [36] The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank

A attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. Mr Craig's distinction between instigation and investigation is flawed accordingly. In my judgment, any inhibition on the freedom to complain will seriously erode the rigours of the criminal justice system and will be contrary to the public interest. In my judgment
B immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged.

(See also *Buckley v. Dalziel and Another* [2007] EWHC 1025 (QB)).

C [32] Premised on the above, we agree with the decision of the Court of Appeal in *Abdul Manaf Ahmad* that on public policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under s. 107 of the CPC as in the case of statement made under s. 112 of the CPC. The underlying reason behind this, is the overriding
D public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice. It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by
E a malicious informant. In any event, if a false report is lodged by a complainant, he is liable to be prosecuted for making false report under s. 177, s. 182 or s. 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[43] Thus, in my view, it is clear that a police report even maliciously
F made is protected by absolute privilege. The subsequent publications by the complainant will only at the most relate to qualified privilege. One single thread which runs through the cases such as *Westcott, Martin Rheinus, Abdul Manaf, Lee Yoke Yam* relates to making of police report and is not related to subsequent publications by the complainant as in the instant case.

G **[44]** I am aware that there are one or two cases subsequent to *Lee Yok Yam*'s case which attempts to say not only the reporting to the police as well as the police report is absolutely privileged but also all subsequent publications related to police report sundry are absolutely privileged. I do not think it is the correct proposition of the law. The proposition if erroneous has to be
H corrected by the due process of law.

Brief Facts

[45] The learned High Court Judge has set out the facts and law in an articulate manner save to deal with the issue whether the second publication will qualify for the defence of absolute privilege. It is also important to note
I that the defendant in this case had only pleaded absolute privilege and not

qualified privilege. This judgment must be read together with the judgment of the learned judge to appreciate the grounds in the proper perspective. The learned judge has summarised the facts of this case as follows:

> The Plaintiffs claim against the Defendant is based on the tort of libel premised on a police report lodged by the Defendant. The Plaintiff averred that it has a service contract with Village Grove Condominium ("the Property"). The Defendant is a registered owner of a unit in the Property. On or about 22nd July 2015 the Defendant lodged a police report alleging that the Plaintiff or its staff had lost three cheques which were handed to the Plaintiff and/or the staffs by the Defendant. The Plaintiff claimed that the words in the police report, namely, ''VGC is now faced with the problem of three missing cheques. Failure to pay on time will result in losses and damage due to contractor taking legal action. We make this report to the police to investigate all the above" are untrue. In their literal and ordinary meaning, the above words were understood to mean that the Plaintiff is a criminal, untrustworthy professional entity in the performance of its job; inefficient, careless and/or negligent in performing its duty and incapable of handling clients' or people's affairs. The publication of the police report has brought the Plaintiff's reputation as a property management company into disrepute, thereby lowering the Plaintiffs esteem in the eyes of its clients, the residents of the Property and/or damaged the Plaintiff's employment prospect. The loss of reputation and dignity is irreparable and the business of the Plaintiff has been badly affected. Hence the Plaintiff commenced the action claiming for damages.

[46] The police report was published by the respondent by affixing at the public notice board of Block A and Block D of the condominium.

[47] I had read the appeal record and able submission of the parties. After giving much consideration to the submission of learned counsel for the respondent, I take the view that the appeal must be allowed. My reasons *inter alia* are as follows:

(a) The second publication in my view for reasons stated above will not qualify for the defence of absolute privilege to kick in. In consequence, the learned High Court Judge ought not have entertained the application for striking out.

(b) Learned counsel for the defendant has also submitted at length that there is no abuse of process of law. The said submission has not been captured in the judgment of the court. The said submission read as follows:

> C. CLAIM FOR ABUSE OF THE PROCESS OF THE LAW
>
> 24. It is submitted that there is no actionable tort of abuse of the process of law hitherto known to the existing law. It is altogether unprecedented and there is no authority on which it can be founded.

25. The recognisable tort of abuse giving rise to a cause of action is the use of the Court process which only consists of the blatant misuse of the legal process to effect an object or purpose other than that for which it is designed and as a result causing damage, falling within the principle in *Grainger v. Hill* [1838] 4 Bing NC 212. (In that case, the plaintiff borrowed £80 from the defendant, the defendant made an affidavit of debt and took out a writ of capias indorsed for bail in the sum of £95 and threatened to arrest the plaintiff if he failed to pay. However, the defendant's real purpose was not to arrest the plaintiff, but to obtain the ship's register so that the plaintiff's ship could not go out to sea and thereby suffered loss of voyages. The plaintiff succeeded in his claim at the trial.)

In the present case, the Respondent's purpose to lodge the police report was to seek the help of the police to find out the whereabouts of the 3 cheques. It was used to effect the purpose for which the process is designed.

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [19961 3 CLJ 695 at 709 (RBA pg 92).

26. It is further submitted that even assuming that an abuse of the process of the law were an actionable tort giving rise to a cause of action, it would be displaced by absolute privilege. In *Marrinan v. Vibart* [1962] 3 All ER 380 (RBA pg 73 & 75), the Court of Appeal held that when absolute privilege applies, it is an absolute immunity from liability to any sort of action, not merely from an action for defamation, save malicious prosecution.

Carter-Ruck on Defamation & Privacy 6th Edn (Para 11.22) (RBA pg 67).

27. The Appellant is a company. Being an inhuman claimant, it has no character to be affected, no personal reputation to be defamed, no feeling, distress and anxiety to be injured. Therefore, there is no legal basis to claim for RM15,000,000.00 as the aggravated damages and RM15,000,000.00 as exemplary damages for distress, anxiety and inconvenience against the Respondent. Carter-Ruck on Libel & Privacy 6th Edn (Para 8.8). (RBA pg 68-69).

28. To claim a sum of RM15,000,000.00 for general damages is clearly an infringement of Order 18 r. 12(A) Rules of Court 2012 (RBA pg 77) which specifically prohibits a party to quantify any amount for general damages in the Statement of Claim.

29. It is submitted that the Appellant's motive of filing the action in this case is not for vindication of its reputation but merely to put the Respondent in fear, to cause her distress and anxiety and to burden her with unnecessary legal expenses to defend the case. The action is in itself a blatant abuse of the process of the Court by the Appellant company.

[48] I do not think it is proper to deal in this judgment with the 'abuse of process of law' issue in this appeal relating to striking out the plaintiff's claim. Though in passant, I will say that an incorporated company's cause of action in defamation is very limited. This has been explained by the Court of Appeal in the case of *Mak Khuin Weng v. Melawangi Sdn Bhd* [2016] 8 CLJ 831; [2016] 5 MLJ 314. These are issues which need to be ventilated in the High Court at the trial.

[49] For reasons stated above, I will allow the appeal with costs of RM5,000 subject to allocatur, with a note that the majority have dismissed the appeal.